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In The

Supreme Court of the United States

October Term, 1990

GREGG POTATO SALES, INC.,

Petitioner,

vs.

LANDIS BROTHERS,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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JURISDICTIONAL STATEMENT

The unpublished per curiam opinion was filed February 25, 1991, the Judgment dated February 25, 1991, and Mandate issued March 20, 1991 and filed March 27, 1991.

A Writ of Certiorari may be granted when a Federal Court of Appeals has rendered a decision in conflict with another Federal Court of Appeals in the same matter. The decision of the Eighth Circuit Court of Appeals is *not* in conflict with the decision of the Ninth Circuit Court of Appeals. Rule 10.1(a) of the Rules of the Supreme Court of the United States is not applicable.

STATEMENT OF THE CASE

After an administrative hearing before the Secretary of Agriculture, the adversely affected party, Gregg Potato Company, filed a Notice of Appeal and a Bond secured by a Certificate of Deposit which bears interest at 8.4% 7 U.S.C. §499g(c).

The Bond was not double the award as required by statute, but did cover the award, interest and costs.

Landis Brothers moved to dismiss the appeal for failure to file a Bond that was double the award. Gregg Potato Company responded it was filed under the authority of *O'Day vs. George Arakelian Farms, Inc.*, 536 F.2d 856 (9th Cir.1976).

The District Court held the appeal to be ineffective, the case of *O'Day vs. George Arakelian Farms, Inc.*, supra, distinguishable on the facts of this case, and ordered dismissal of the same. Gregg Potato Company filed its

Notice of Appeal to the Eighth Circuit Court of Appeal and filed a motion to set the amount of the Appeal and Cost Bond. The United States District Court for the District of North Dakota ordered an additional bond in the sum of $14,000.00 to be deposited and thereafter approved the Bond.

Upon the filing of the unpublished per curiam decision of the United States Court of Appeals affirming the trial court, the appellant herein sought a Writ of Certiorari to the United States Supreme Court.

STATEMENT OF FACT

A Complaint was filed by Landis Brothers against Gregg Potato Sales, Inc. on June 25, 1987 under the Perishable Agricultural Commodities Act of 1930, as amended (7 U.S.C. §499a, et seq.). Gregg Potato Sales, Inc. answered and counterclaimed for monies due it from Landis Brothers and Phillip Landis, Sr.

The Complaint alleged an oral contract for the sale of approximately 21 truckloads of bulk white Norchip potatoes at $3.25 cwt., less shipping charges, leaving a net sales price of $2.95 cwt. The Complaint also claimed that 9,038.8 cwt. were sold under the oral contract.

Respondent claimed that the oral contract was one of consignment, because the potatoes were frost damaged at the time of harvest and storage and had no value as No. 2 white potatoes and that Respondent agreed to attempt to market the potatoes on a consignment and brokerage basis. The Respondent also claimed thereafter it was

owed the sum of $9,856.00 for freight and seed potatoes sold, but not paid for.

A hearing was had before Donald A. Campbell, Judicial Officer of the Office of the Secretary of Agriculture. Hearing Officer Campbell found for the complainant on all counts. He thereafter ordered payment of $26,971.43 with interest at the rate of 13% from December 1, 1986 until paid; that he allowed Petitioner's reparation fees and expenses of $1,286.46 with interest at the rate of 13% on this amount from the date of the Order which totaled $36,769.62 on May 1, 1990.

Respondent timely filed a Notice of Appeal with the United States District Court, District of North Dakota, Fargo, North Dakota, on the 4th day of May, 1989, and filed the required Notice of Appeal, Petition, but only filed a supersedeas bond in the principal sum of $40,000.00 by way of a Certificate of Deposit that bears interest at the rate of 8.4% per annum.

Upon motion of the Respondent Landis Brothers, the District Court for the District of North Dakota dismissed the appeal upon the ground that the appeal was ineffective because an insufficient Bond had been filed.

REASON FOR DENYING THE WRIT

THERE IS NO CONFLICT BETWEEN THE DECISIONS OF THE EIGHTH AND NINTH CIRCUIT COURTS OF APPEALS

The Ninth Circuit Court of Appeals held in the case of *O'Day vs. George Arakelian*, 536 F.2d 856 (9th Cir.1976) the requirement of a bond of double the amount of the

reparation award, plus interest, costs and attorney's fees awarded is unconstitutional only as applied to would-be appellants unable to afford such a bond. The Eighth Circuit Court of Appeals' decision is not in conflict with the *Arakelian* decision, it merely distinguished it on the facts by pointing out "Gregg has never claimed that it is unable to pay for a bond in the proper amount." Petitioner's appendix, page A-2.

PETITIONER IS RAISING AN ISSUE NEVER RAISED BELOW REGARDING FINANCIAL INABILITY

Petitioner states at page six of its brief, "had the appellant been obligated to file a bond in the sum of double the amount, a bond in the sum of $80,000.00 would have had to have been filed *which would have been financially impossible for the appellant to do.*" (Emphasis Added).

The order of the U.S. District Court for the District of North Dakota clearly stated:

> The appellant relies on the *Arakelian* decision to argue that the double bond requirement is unconstitutional and not rationally relating to securing the risk. The *Arakelian* court, however, found the double requirement unconstitutional or unreasonable only as applied to that appellant and those similarly situated. *Appellant in the case does not profess an inability to pay.* Thus, *Arakelian* does little to further their cause. Petitioner's appendix, Page A-6. (Emphasis Added).

Likewise, the order of the Eighth Circuit clearly stated:

> Gregg relies now, as it did below, on *O'Day vs. George Arakelian Farms, Inc.*, 536 F.2d 856 (9th

> Cir.1976), which held that double bond requirement of § 499g(c) was unconstitutional. As the district court pointed out, however, the *Arakelian* court found the requirement of a bond of double the award unconstitutional only as applied to would-be appellants unable to afford such a bond. *Gregg has never claimed that it is unable to pay for a bond in the proper amount.* We therefore affirm the district court. Petitioner's appendix, page A-2. (Emphasis Added).

Gregg Potato Sales, Inc. is now, for the first time, raising the issue of its inability to provide a double bond in its petition for a Writ of Certiorari.

PETITIONER IS RAISING AN ISSUE NEVER RAISED BELOW REGARDING LACK OF JURISDICTION

Gregg Potato Sales, Inc. is now for the first time raising the issue of whether there was jurisdiction under the Perishable Agricultural Commodities Act of 1930. Obviously, if this issue had been raised by Gregg Potato at either the administrative hearing level, the appeal to the United States District Court, or the appeal to the Eighth Circuit Court of Appeals, it would have been addressed. It was never raised and hence never addressed. Please see U.S. Department of Agriculture Decision and Order at page A-8 of Petitioner's appendix, U.S. District Court for North Dakota Order and Judgment at page A-5 of Petitioner's appendix, and Eighth Circuit Per Curiam Opinion at page A-1 of Petitioner's appendix.

Gregg Potato is incorrect when it states, " . . . the potatoes had spoiled in a warehouse in Grand Forks, North Dakota . . . ". (Page II of Petition). The potatoes were stored at the A & L Potato Company warehouse,

operated by Thomas Bushee. Petitioner's appendix, page A-14.

At the hearing held in Grand Forks, North Dakota on June 14, 1988, Jim Gregg testified and identified himself as the secretary-treasurer or Gregg Potato Sales. (Hearing Transcript, page 9). Jim Gregg testified the potatoes were trucked from the Landis Farm to eight warehouses Gregg Potato "had lined up" in East Grand Forks (Minnesota). (Hearing Transcript, page 26).

Landis Brothers farmed in Grand Forks County, North Dakota. Gregg Potato Sales, Inc. is located in Crookston, Minnesota (Petitioner's brief, page II). The potatoes were stored in East Grand Forks, Minnesota until Gregg Potato Sales started selling them to third parties and shipping the potatoes to places such as Plant City, Florida, Clio, Minnesota, Clark, South Dakota, Rhinelander, Wisconsin, Kansas City, Missouri, Harahan, Louisiana, and Norwalk, Ohio. (Please see Gregg Potato Sales, Inc's Exhibit I received at the June 12, 1988 hearing).

CONCLUSION

Gregg Potato Sales, Inc. has raised two new issues in its petition for the writ of certiorari: that it could not financially afford to post a bond in double the amount of the total reparations award, and that Landis Brother's claim did not fall within the jurisdiction of the Perishable Agricultural Commodities Act of 1930. It should not now be allowed to raise those two issues.

This Court has articulated a general rule that "an appellate court does not give consideration to issues not raised below." *Hormel vs. Helvering*, 312 U.S. 552, 556 (1941). The *Hormel* court recognized that the judicial system is structured in such a way that the trial court sees the evidence, hears the testimony and the arguments and then decides the issues presented to it. *Id.* The appeals courts cannot decide issues without evidence and at the appellate level the parties have no opportunity to present it. *Id.* "Recognition of this general principle has caused this court to say on a number of occasions that the reviewing court should pass by, without decision, questions which were not urged before the (lower courts)." *Id.*

After giving recognition to this general principle, this Court went on to admit that inflexible rules may result in a defeat of justice under some circumstances. *Id.* at 557-58. Circumventing the rule to prevent "a plain miscarriage of justice," *id.* at 558 became one of the components of a test alluded to in *Singleton vs. Wulff*, 428 U.S. 117, 121 (1976), which determines when issues may be raised and resolved for the first time in a court of appeals. The court specifically noted that the matter would be left to the discretion of the appellate courts on a fact specific basis. The guiding considerations consist of determining 1) whether injustice might otherwise result, *see, Hormel vs. Helvering*, or 2) whether the proper resolution is beyond any doubt. *Singleton vs. Wulff*, 428 U.S. at 121.

It would clearly be unjust to allow Gregg Potato Sales, Inc. to now raise the issue as to whether in May of 1989 it had sufficient assets to file the appeal bond in the required amount, and to let it also raise a jurisdictional

issue which had already been decided at the hearing before the Office of the Secretary of Agriculture.

Gregg Potato Sales, Inc. has also stated this writ of certiorari should be granted to resolve the conflict in decisions between the Ninth Circuit Court of Appeals in the *Arakelian* case, supra, and the Eighth Circuit Court of Appeals in this case. That is incorrect. The Eighth Circuit Court of Appeals distinguished this case on the facts from the *Arakelian* case, supra, it did not disagree with the holding.

Landis Brothers respectfully request this Court deny the petition for the writ of certiorari.

DATED: May 22, 1991.

Respectfully submitted,

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